DANH COI & ORS v. PP

HIGH COURT SABAH & SARAWAK, BINTULU
LEE HENG CHEONG J
[CRIMINAL APPEALS NO: BTU-42(ORS)-1-10-2015,
BTU-42(ORS)-2-10-2015 & BTU-42(ORS)-3-10-2015 &
BTU-42(ORS)-4-10-2015]
28 JULY 2016

CRIMINAL LAW: *Offences – Fisheries – Convictions under s. 15(1)(a) of Fisheries Act 1985 – Guilty plea – Whether accused persons understood charges and consequences of pleading guilty – Whether convictions and sentences passed by trial judge proper – Whether within ambit of s. 25 of Fisheries Act 1985 – Criminal Procedure Code, s. 173(a) & (b)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Convictions under s. 15(1)(a) of Fisheries Act 1985 – Guilty plea – Whether accused persons understood charges and consequences of pleading guilty – Whether trial judge complied with s. 173(a) and (b) of Criminal Procedure Code – Whether convictions and sentences passed by trial judge proper – Whether within ambit of s. 25 of Fisheries Act 1985*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction – Guilty plea – Whether convicted person could appeal against conviction after pleading guilty – Whether appeal limited to extent or legality of sentence – Whether appeal against conviction was incompetent – Criminal Procedure Code, s. 305*

CRIMINAL PROCEDURE: *Forfeiture – Fisheries offence – Order of forfeiture and disposal of vessels and exhibits – Appeal against order – Whether vessels used in commission of offences under s. 15(1)(a) of Fisheries Act 1985 – Whether vessels and other appurtenances liable to forfeiture under s. 52 – Whether forfeiture order proper*

FISHERIES*: Enforcement – Procedure – Powers of Malaysian Maritime Enforcement Agency ('MMEA') – Whether MMEA has all powers which relevant agency may exercise under any Federal Law in Malaysian Maritime Zone – Whether ranks of MMEA equivalent with Federal Authorities specified in or under any other written law – Whether MMEA empowered to investigate cases and offences under Fisheries Act 1985 – Malaysian Maritime Enforcement Agency Act 2004, ss. 2, 3, 5, 6(1), 7(1), (2) & (3)*

The appellants who were faced with charges at the Sessions Court for offences under s. 15(1)(a) of the Fisheries Act 1985 ('the Act'), pleaded guilty to the charges preferred against them. Upon convictions, they were sentenced under s. 25(a) of the Act. The Sessions Court Judge ('SCJ') further ordered that all the vessels and exhibits *ie*, appurtenances and fishing appliances be forfeited pursuant to s. 52(1)(a)(i) and (ii) of the Act. Hence, the appeals by the appellants against the convictions, sentences orders of forfeiture and disposal of the vessels and exhibits.

Held (dismissing appeals):

(1) It was clear from the appeal records that all the appellants understood the charges preferred against them and the nature and consequences of pleading guilty and had pleaded guilty. Throughout the proceedings in the Sessions Court, all the appellants were represented by their counsel who had also mitigated on behalf of all the appellants before they were convicted on their own plea of guilty and before sentences were passed. The SCJ had fully complied with s. 173(a) and (b) of the Criminal Procedure Code ('CPC'). Therefore, the convictions and the sentences passed by the SCJ was proper and within the ambit of s. 25 of the Act. (paras 6, 7 & 8)

(2) Section 305 of the CPC prevents a convicted person from appealing against his conviction if he had pleaded guilty to the charge. However, he may appeal to the extent or legality of the sentence. The court, having found that appellants' appeals against their convictions were incompetent as they had pleaded guilty, proceeded to consider the merits of the appeals of the appellants against the extent and legality of the sentences. (paras 9 & 10)

(3) The vessels in the four appeals were used in the commission of the offences under s. 15(1)(a) of the Act. All the vessels together with their appurtenances were liable for forfeiture pursuant to s. 52 of the Act. The section used the word 'shall' which showed that it is mandatory for the court to make an order of forfeiture as all the four vessels were the subject matter of the offences together with the trawl nets found on the vessels. Thus, the SCJ's order for forfeiture was proper. (paras 15 & 21)

(4) There was no evidence in the form of affidavits or statutory declarations adduced to substantiate the appellants' contention that they had pleaded guilty under a mistaken view of the law. In any event, the appellants had the access and benefit of experienced counsel. Hence, the appellants could not contend that they had pleaded guilty under a mistaken view of law. (para 23)

(5) Several sections under the Malaysian Maritime Enforcement Agency Act 2004 ('MMEA Act') empower the Malaysian Maritime Enforcement Agency ('MMEA') to arrest, detain and investigate offences under the Act. The MMEA Act expressly provides that the MMEA has all the powers which the relevant agency, in this case the Fisheries Department of Malaysia, may exercise under any Federal Law in Malaysian Maritime Zone. The MMEA Act further provides that the ranks of the MMEA are equivalent with the Federal Authorities specified in or under any other written law. Hence, pursuant to ss. 2, 3, 5, 7(1), (2) and (3) of the MMEA Act read together with s. 6(1) of the MMEA Act, the MMEA is empowered to investigate cases and offences

under the Act which is a Federal Law, in the exercise of its purpose and function for the maintenance of law and order in the Malaysian Maritime Zone. (paras 28 & 31-33)

Case(s) referred to:
PP v. Ismail Yusof [1979] 1 LNS 75 FC ***(refd)***
PP v. Narongne Sookpavit & Ors [1985 1 LNS 20 HC ***(refd)***
PP v. Sai & Ors [1979] 1 LNS 80 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(a), (b), 305
Fisheries Act 1985, ss. 15(1)(a), 25(a), 52(1)(a)(i), (ii)
Malaysian Maritime Enforcement Agency Act 2004, ss. 2, 3(1), (2), 5, 6(1), 7(1), (2), (3)

For the appellant - CM Sundram
For the respondent - Sheena Hasanah Abdul Hadi, DPP

Reported by S Barathi

JUDGMENT

Lee Heng Cheong J:

Introduction

[1] The above appellants in the above four appeals ("the four appeals") were charged at the Sessions Court in Bintulu, Sarawak for offences under s. 15(1) (a) of the Fisheries Act 1985 as per the charges (see pp. 16 & 17 of the respective appeal records).

[2] The above appellants pleaded guilty to the charges preferred against them and upon their convictions on 13 October 2015, they were sentenced under s. 25(a) of the Fisheries Act 1985 by the learned Sessions Court Judge as follows:

[i] CRIMINAL APPEAL NO. BTU-42(ORS)-1/10-2015 [Sessions Court's Case no: BTU-62EG-3/9-2015]

[a] In respect of the Captain [Master]/1st Appellant, a fine of RM300,000.00 was imposed in default 3 months' imprisonment, and

[b] In respect of the 2nd until 20 th Accused/Appellants, a fine of RM50,000.00 was imposed in default 2 months' imprisonment.

[ii] CRIMINAL APPEAL NO. BTU-42(ORS)-2/10-2015 [Sessions Court's Case no: BTU-62EG-4/9-2015]

[a] In respect of the Captain [Master]/1st Appellant, a fine of RM300,000.00 was imposed in default 3 months' imprisonment, and

[b] In respect of the 2nd until 5th Accused/Appellants, a fine of RM50,000.00 was imposed in default 2 months' imprisonment.

A [iii] CRIMINAL APPEAL NO. BTU-42(ORS)-3/10-2015 [Sessions Court's Case no: BTU-62EG-5/9-2015]

[a] In respect of the Captain [Master]/1st Appellant, a fine of RM300,000.00 was imposed in default 3 months' imprisonment, and

B [b] In respect of the 2nd until 18 th Accused/Appellants, a fine of RM50,000.00 was imposed in default 2 months' imprisonment.

[iv] CRIMINAL APPEAL NO. BTU-42(ORS)-4/10-2015 [Sessions Court's Case no: BTU-62EG-6/9-2015]

C [a] In respect of the Captain [Master]/1st Appellant, a fine of RM300,000.00 was imposed in default 3 months' imprisonment, and

[b] In respect of the 2nd and 3rd Accused/Appellants, a fine of RM50,000.00 was imposed in default 2 months' imprisonment.

D **[3]** All the above appellants were further ordered to be referred to the Immigration Department for further action upon completion of the sentence.

[4] The learned Sessions Court Judge also ordered that all the vessels and the exhibits ie, appurtenances, fishing appliances in the four appeals, to be forfeited pursuant to s. 52(1)(a)(i) and (ii) of Fisheries Act 1985 as follows:

E [i] In Criminal Appeal No. BTU-42(ORS)-1/10-2015 [Sessions Court's Case no: BTU-62EG-3/9-2015], the vessel – BV97999TS and exhibits number 1 to 8 [see page 49 Appeal Record] to be forfeited to the Government of Malaysia pursuant to section 52(i) and (ii) of the Fisheries Act 1985;

F [ii] In Criminal Appeal No. BTU-42(ORS)-2/10-2015 [Sessions Court's Case no: BTU-62EG-4/9-2015], the vessel – BV9082TS and exhibits number 1 to 10 [page 47 Appeal record] to be forfeited to the Government of Malaysia pursuant to section 52i) and (ii) of the Fisheries Act 1985;

[iii] In Criminal Appeal No. BTU-42(ORS)-3/10-2015 [Sessions Court's G Case no: BTU-62EG-5/9-2015], the vessel – BV9415TS and exhibits number 1 to 12 [see page 47 Appeal Record] to be forfeited to the Government of Malaysia pursuant to section 52(i) and (ii) of the Fisheries Act 1985; and

[iv] In Criminal Appeal No. BTU-42(ORS)-4/10-2015 [Sessions Court's H Case no: BTU-62EG-6/9-2015], the vessel – BV99658TS and exhibits number 1 to 8 [see page 47 Appeal 6 Record] to be forfeited to the Government of Malaysia pursuant to section 52 (i) and (ii) of the Fisheries Act 1985.

[5] The above appellants being dissatisfied with the decisions by the I learned Sessions Court Judge of the Sessions Court at Bintulu made on 13 October 2015, appealed against the convictions, sentences, orders of forfeiture and disposal of the vessels and exhibits.

Pleading Guilty

[6] This court finds that from the appeal records in respect of the four appeals, all the appellants understood the charges preferred against them and the nature and consequences of pleading guilty and pleaded guilty. Throughout proceedings in the Sessions Court, all the appellants were represented by their counsel who also mitigated on behalf of all the appellants before they were convicted on their own plea of guilty and before the sentences were passed by the learned Sessions Court Judge.

[7] The learned Sessions Court Judge upon being satisfied that the offences have been committed, admission of the facts of the cases by the appellants, that the appellants have voluntarily pleaded guilty, accepted the appellants' guilty plea and convicted them of the offences preferred against them. The notes of proceedings showed that the learned Sessions Court Judge had complied fully with s. 173(a) and (b) of the Criminal Procedure Code.

[8] Thus this court finds that the convictions of the all the appellants and the sentences passed by the learned Sessions Court Judge was proper and within the ambit of s. 25 of the Fisheries Act 1985.

[9] Section 305 of the Criminal Procedure Code prevents a convicted person from appealing against his conviction if he had pleaded guilty to the charge, such person may however appeal to the extent or legality of the sentence. By pleading guilty to the charge, they are deemed to have waived their right to question the legality of their convictions.

Consideration Of The Appeals

[10] This court having found that the appellants' appeals against their convictions are incompetent as the appellants have pleaded guilty and thus they cannot appeal against their conviction, shall proceed to consider the merits of the appeals of the appellants against the extent and legality of the sentences imposed.

[11] Since the appellants have pleaded guilty, thus the appeals herein are only to the extent and legality of the sentence imposed. This court finds that the learned Sessions Court Judge had considered all the relevant mitigating factors and applied all the relevant sentencing principles and laws before passing the sentences.

[12] Section 52 of the Fisheries Act 1985 states as follows:

> (1) Where any person is found guilty of any offence:
>
> (a) Under section 8(a), 11(3), **15(1)(a)** or 26;
>
> (b) ...
>
> the court **shall,** in addition to any other penalty that may be imposed:

A

(i) Order that the vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliance), vehicle, article or thing used in the commission of such offence or in relation to which such offence has been committed be forfeited; and

(ii) order that any fish caught in the commission of such offence or the proceed of the sale of any fish or other article of a perishable nature referred to in section 48, and any explosive, poison, pollutant, apparatus or prohibited gear used or intended to be used in the commission of such offence be forfeited.

(emphasis added)

[13] The offences committed under s. 15(1)(a) of Fisheries Act 1985 must be read with s. 52 of the same Act. In the present case, the offences were committed under s. 15(1)(a) Fisheries Act 1985 whereby all the appellants operated foreign vessels in Malaysian Fisheries Waters without a permit issued by the Director of Fisheries Malaysia. Section 52 of the Fisheries Act clearly laid down the court's power and/or duty to order for forfeiture of the vessels together with the exhibits ie, appurtenances and fishing appliance in the commission of the offences by the appellants.

[14] In the present four appeals, a perusal of all the exhs. P1 of the cases which are the subject matters of the four appeals herein, namely BTU-62EG-3-9-2015, BTU-62EG-4-9-2015, BTU-62EG-5-9-2015 and BTU-62EG-6-9-2015, at pp. 49, 47, 47 and 47 respectively of the four appeal records of the four appeals showed that the offences were committed by all the appellants. They were all together on the vessels namely BV97999TS, BV9082TS, BV9415TS and BV99658TS in furtherance to commit the same offence that is engaging in fishing activities. The vessels were in the command of and manned by the first appellants in the four appeals and the other appellants are the crew of the respective vessels who played their respective part and role in the fishing activities.

[15] It is undisputed that all the vessels in the four appeals namely BV97999TS, BV9082TS, BV9415TS and BV99658TS were used in the commission of the offences under s. 15(1)(a) of the Fisheries Act 1985 and the court shall make order for forfeiture notwithstanding there is no person being convicted of such offence. The vessels in the above appeals were used in the commission of the offences that were engaging into fishing activity without any permit in Malaysian Waters.

[16] In the case of *PP v. Narongne Sookpavit & Ors* [1985] 1 LNS 20; [1987] MLJ 100, at p. 106, the court held *inter alia* as follows:

> ... the boat and the fishing appliances where the subject matter of the offence and notwithstanding that no person was convicted of such offence in the court below, an order of forfeiture should have been made.

[17] In the four appeals, the appellants were charged for an offence under s. 15(1)(a) of the Fisheries Act 1985. Hence, the learned Sessions Court Judge is bound to make an order for forfeiture as provided under s. 52 of the Fisheries Act 1985.

[18] This court finds that when the trial court is satisfied that any offence has been committed under s. 15(1)(a) of the Fisheries Act 1985 and as stipulated under s. 52(1)(a) of the same Act, the four vessels used in the commission of the offence shall be forfeited

[19] This court is guided by the Federal Court case of *PP v. Ismail Yusof* [1979] 1 LNS 75; [1979] 2 MLJ 119, at p. 121, the Federal Court held *inter alia* as follows:

> when it is proved to the court's satisfaction that an offence under section 13(1) of the Act has been committed of using a net prohibited by the regulations, that the boat used in the commission of the offence, the court is bound UNDER SECTION 15(1) to make an order for forfeiture of the boat. ...
>
> ... secondly, **even if the boat was not the subject matter of the offence and only the net was,** there is no doubt that it was used in the commission of the offence of using for the purpose of fishing a net described in the schedule, a net totally prohibited by the law. The vessel was in the same position as a parang used by a killer. The parang was not the subject matter of the offence, but it certainly was a thing used in the commission of the offence of killing.
>
> (emphasis added)

[20] Further guidance can be found in the case of *PP v. Sai & Ors* [1979] 1 LNS 80; [1979] 2 MLJ 153, where Salleh Abas FJ held as follows:

> as the vessel was used in the commission of the offence, an order of forfeiture of the vessel should have been made. The order of forfeiture of the vessel should have been made even if the learned Magistrate was satisfied that the offence proved was an offence of possession of fishing appliances without a permit.

[21] In these four appeals, this court finds that all the four vessels together with their appurtenances were liable for forfeiture pursuant to s. 52 of the Fisheries Act 1985. In the said section, the word "… shall" was used and it showed that it is mandatory for the court to make an order of forfeiture because all the four vessels are the subject matter of the offences together with the trawl nets found on the vessels and thus, the learned Sessions Court Judge's orders for forfeitures was proper.

[22] The issue of power of Malaysian Maritime Enforcement Agency ("MMEA") does not fall under the extent and illegality of sentence under s. 305 of the Criminal Procedure Code.

[23] The appellants' counsel contended that the appellants on their own have pleaded guilty under a mistaken view of the law. This court finds that this contention is without merits as there was no evidence to substantiate this contention. All the appellants herein at the Sessions Court were represented by the same counsel as at these four appeals herein. All the appellants had access to and the benefit of an experienced counsel at all material times thus they cannot be heard now to contend that they pleaded guilty under a mistaken view of the law. In any event this court finds that this is a submission from the Bar as there are no evidence in the form of affidavits or statutory declarations from the appellants that they pleaded guilty under a mistaken view of the law.

[24] The appellants' counsel further contended that the MMEA can only take action against offenders within the ambit of the Malaysian Maritime Enforcement Agency Act 2004 ("MMEA Act 2004") and not under the Fisheries Act 1985.

[25] Section 3(1) and (2) of the MMEA Act 2004 states as follows:

> (1) For the purpose of this Act, the Malaysian Maritime Enforcement Agency is established.
>
> (2) The Agency shall, subject to this Act, be employed in the Malaysian Maritime Zone for the maintenance of law and order, the preservation of the peace, safety and security, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security offence.

[26] This court finds that by virtue of s. 3(2) of the MMEA Act 2004 and since the MMEA is responsible for maintaining the law and order in the Malaysian Maritime Zone, the MMEA thus have the power and authority to apprehend the offender for offences occurring in the Malaysian Maritime Zone which definitely includes offenders under the Fisheries Act 1985.

[27] Section 7(3) of the MMEA Act 2004 as follows:

> (3) Without prejudice to the generality of subsection (1), an officer of the agency shall have, for the purpose of this act, all the powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone.

[28] As regards the powers and authority of the MMEA to investigate offences under the Fisheries Act 1985, the court finds that several sections in the MMEA Act 2004 empowered the MMEA to arrest, detain and investigate offences under the Fisheries Act 1985.

[29] The MMEA's power to arrest, detain and investigate, is contained in s. 7 of the MMEA Act 2004. Section 7(2) and s. 7(3) of the MMEA Act 2004 states as follows:

Section 7: Powers Of The Agency

(1) The Agency shall have powers to carry out the purposes mentioned in subsection 3(2) and to do all things reasonably necessary for or incidental to the performance of its function under section 6.

(2) In particular, but without prejudice to the generality of subsection (1), the agency shall have to power:

(a) to receive and consider any report of the commission of an offence;

(b) to stop, enter, board, inspect and search any place, structure vessel or aircraft and to detain any vessel or aircraft;

(c) to demand the production of any licence, permit, record, certificate or any other document and to inspect such licence, permit, record, certificate or other document or make copies of or take extracts from such licence, permit, record, certificate or other document;

(d) to investigate any offence which it has reason to believe is being committed, or is about to be committed or has been committed;

(e) to exercise the right of hot pursuit;

(f) to examine and seize any fish, article, device, goods, vessel, aircraft or any other item relating to any offence which has been committed or it has reason to believe has been committed;

(g) to dispose any fish, article, device, goods, vessel, aircraft or any item relating to any offence which has been committed or it has reason to believe has been committed;

(h) to arrest any person whom it has reason to believe has committed an offence; and

(i) to expel any vessel which it has reason to believe to be detrimental to the interest of or to endanger the order and safety in the Malaysian Maritime Zone.

(emphasis added)

[30] Further, s. 7(3) of the MMEA Act 2004 states as follows:

(3) Without prejudice to the generality of subsection (1), an officer of the Agency shall have, for the purpose of this Act, **all the powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone.** (emphasis added)

[31] A perusal of s. 7(3) of the MMEA Act 2004 clearly showed the MMEA have all the powers "which any relevant agency may exercise under any Federal Law" and included the Fisheries Department of Malaysia.

[32] This court finds that the MMEA Act 2004 expressly provides that the MMEA have all the powers which the relevant agency [in this case, the Fisheries Department] may exercise under any Federal Law in the Malaysian Maritime Zone. MMEA Act 2004 further provides that the ranks of the MMEA are equivalent with the Federal Authorities specified in or under any other written law (which is Fisheries Department in the present appeals).

[33] This court finds that by virtue of s. 2, s. 3, s. 5, s. 7(1), 7(2) and 7(3) of the MMEA Act 2004 read together s. 6(1) of the MMEA Act 2004, the MMEA is empowered to investigate cases and offences under the Fisheries Act 1985 which is a Federal Law, in the exercise of its purpose and function for the maintenance of law and order in the Malaysian Maritime Zone.

Order

[34] In the light of this court's above findings, this court finds that there are no merits in the four appeals. In the premises, this court dismisses the four appeals.